

MEMORANDUM

Department of Information Services



To: Honorable Mayor and City Council
Through: Charles Lawson, City Manager
From: Diana Whitecar, Economic Development Manager *DW*
Bill Marion, Information Services Director *BM*
Subject: EarthLink WiFi Proposal
Date: March 10, 2006

Background:

Late last year, the City was approached by EarthLink Inc., with a proposal to offer WiFi service within the City of Milpitas. This proposal involved the mounting of devices on City light poles and traffic light poles within the public right of way. This would provide wireless Internet service to nearly all residential and commercial areas of the City.

EarthLink is one of the largest national Internet Service Providers (ISP) with 5.3 million subscribers. They have been cited for award winning customer support and customer experience and have annual revenues in excess of \$1.3 billion. EarthLink was selected by Wireless Philadelphia to develop and implement the nation's largest municipal Wi-Fi broadband network and in California EarthLink was selected by the City Of Anaheim to implement Wi-Fi broadband throughout the city.

Under the proposed agreement, the City will allow EarthLink to access the public right of way and use City owned streetlight poles and traffic signal poles to mount WiFi transmitters. Depending on the area, between 30 and 45 devices will be installed per square mile. EarthLink utilizes the same WiFi technology that the City currently uses for Police and Fire mobile computers, and the hardware proposed will be the same as currently exists on street light poles.

Currently EarthLink is proposing to cover the residential and commercial areas of the City and will offer service to consumers at a rate estimated to be in the range of \$20 per month. Other rate plans in the area of \$5 are envisioned for daily use by visitors or business travelers. In

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exchange for the use of the public right of way, EarthLink will provide a number of accounts to the City of Milpitas at no charge. Specifically, the Public Safety functions will be provided a high priority, secure connection through EarthLink to the City network. Additionally, EarthLink will provide consumer grade service for other City mobile uses, such as Building Inspectors and Code Enforcement. The City will also receive free Internet access at the Community Center, Teen Center and Senior Center. While the technical design is not yet completed, it is likely that EarthLink will be interested in leasing space at City facilities or the use of City underground conduit and fiber optics. These arrangements would be made under a separate lease agreement. EarthLink will be responsible for making arrangements with Pacific Gas and Electric for payment of electricity usage charges.

The City reserves the right to approve or deny the installation of devices in specific areas or on specific streetlight poles such as decorative poles. EarthLink has proposed customer service standards and will be responsible for the maintenance and support of the network. The term of the agreement is for 10 years with 2 additional 5 year renewal terms. EarthLink has agreed to reimburse the City for staff time spent supporting this project at a to be agreed upon rate.

While the City is involved in the Wireless Silicon Valley Initiative to provide regional WiFi service, staff recommends that the EarthLink proposal be accept at this time. There is potentially great benefit to the City and minimal risk. No financial investment by the City is required and the technology proposed is proven and compatible with existing City equipment. On February 27th this proposal was presented to the Telecommunications Commission and with input from members of the Economic Development Commission was recommended for approval. This agreement would be in line with the goals and plans of both the Economic Development Commission and the Telecommunications Commission.

Staff has received another proposal from MetroFi, which is installed in several south bay cities and offers a free ad supported service. Staff will be continuing discussions with MetroFi and believes that a suitable agreement can be drafted and presented to Council for approval. Should agreements with both providers be reached, the City would have a range of WiFi services from free to high-end full service.

Recommendation:

Authorize the City Manger to execute an agreement with EarthLink, Inc., to provide WiFi service and for the use of the public right of way, subject to approval as to form by the City Attorney.

DRAFT

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT, dated for purposes of identification only this _____ day of _____, 2006 ("Effective Date") is entered into between the CITY OF MILPITAS, a municipal corporation ("Milpitas" or "City") and EARTHLINK, INC., _____ a corporation of the State of Delaware ("EarthLink").

RECITALS

WHEREAS, Milpitas requested proposals, offering the use of identified City infrastructure, to accomplish a City-wide wireless network; and

WHEREAS, following evaluation and negotiation, EarthLink was deemed a qualified provider by the City; and

WHEREAS, EarthLink desires to provide its Services in Milpitas and, in order to do so desires to mount, install, operate and maintain certain equipment in areas approved by Milpitas in accordance with the Plans and Specifications on certain streetlight poles and traffic signal poles, and utilize Milpitas fiber to connect certain radio antennas to its Internet point of presence, all in accordance with the terms, provisions and conditions contained in this Agreement ("Network"); and

WHEREAS, Milpitas desires to have the Services provided by EarthLink available for use by Milpitas and its citizens, businesses and guests in accordance with the terms, provisions, and conditions contained in this Agreement; and

WHEREAS, capitalized words will have the meaning defined in the attached Exhibit A: "Definitions" and in the body of this Agreement.

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL PROMISES, COVENANTS AND CONDITIONS HEREIN CONTAINED, THE PARTIES HERETO AGREE AS SET FORTH IN THE RECITALS ABOVE AND AS FOLLOWS:

1. **TERM OF AGREEMENT** — The Term of this Agreement shall be for ten (10) years and will automatically renew for two additional renewal terms of five (5) years each unless notice of non-renewal is timely given in the manner hereinafter provided (collectively "Term"). EarthLink may give written notice of non-renewal to Milpitas at least six (6) months prior to the end of the original term or a renewal term. Milpitas may give written notice of non-renewal to Earthlink at least twelve (12) months prior to the end of the original term or a renewal term but only if there has been a substantial and continuing failure by EarthLink to satisfy the mutually agreed upon material benchmarks for speed, coverage and reliability as set forth in the then-applicable service level agreements ("Benchmarks") over a period of at least two (2) years (without EarthLink making good faith efforts to cure) and after receipt of such

notice EarthLink fails to materially improve the services so that they are provided in substantial compliance with the material Benchmarks prior to the effective renewal date.

2. **PLANS AND SPECIFICATIONS**—EarthLink will obtain from Milpitas approvals of the plans and specifications for the Network prior to any installation under this Agreement, including without limitation any upgrades or enhancements, which approval will not be unreasonably withheld or delayed unless Milpitas can establish that the proposed installation violates public safety, or any Federal, State or Local rules and regulations, or building code requirements; provided, however, that any review or comment by Milpitas shall in no way relieve EarthLink of any duties or obligations set forth in this Agreement. Milpitas will notify EarthLink in writing of any objection and the evidence for such objection within forty-five (45) calendar days of EarthLink's submission of any plans or specifications. EarthLink is not obligated to expend any funds on the Network until all approvals have occurred and, including without limitation obtaining all Underlying Rights (collectively the "Approvals") and, if any Approval is in legal dispute or revoked then EarthLink will be entitled to suspend performance under this Agreement at its option until all Approvals are reinstated or no longer in legal dispute. If Milpitas does not approve the Plans and Specifications for the Network within ninety (90) calendar days of delivery to the City, or if all Approvals are not obtained within 180 calendar days of such delivery, then EarthLink shall be entitled to terminate this Agreement without any default or any further liability or obligation by either party of any kind.
3. **SCHEDULE OF PERFORMANCE**—All work to be performed under this Agreement shall be commenced and completed in accordance with the time schedule set forth in EXHIBIT "C", entitled Schedule of Performance and coordinated through the Milpitas representative assigned to this Agreement, subject to delays caused by Milpitas or any other third party. If the performance is delayed then EarthLink will not be in default hereunder for as long as EarthLink continues to take all commercially reasonable actions to correct any delay or failure to comply with the Schedule of Performance.
4. **DESCRIPTION OF WORK** — During the Term of this Agreement, EarthLink is authorized and required to mount, install, operate, repair and maintain at EarthLink's sole cost and expense, equipment, radios and antennas, or such other comparable equipment on sites and property pre-approved by City. Subject to Milpitas's prior approval and all applicable Federal, State, and local ordinances, laws and regulations EarthLink may use streetlight poles and traffic signal poles located within all of the public rights of way owned by Milpitas together with the traffic signals and street lights attached to the poles owned by Milpitas ("Poles") in accordance with the Plans and Specifications and Schedule of Performance in order to provide the services required by this Agreement. Such services shall be in accordance with the mutually agreed

upon coverage level as defined in the applicable service level agreements ("Coverage Level"). For the Term of this Agreement, EarthLink is authorized to use public rights of way owned by Milpitas for access to Poles owned by the City to which communications equipment is or will be attached pursuant to this Agreement. Such access shall be twenty-four (24) hours per day, every day, subject to applicable restrictions and regulations relating to traffic, noise, public safety and other requirements. Upon completion of each task, installation and phase of work to be performed under this Agreement, EarthLink shall promptly restore all work site areas to a clean and safe condition as described in the Statement of Work. Milpitas will cooperate with EarthLink to identify City-owned streetlight poles, traffic signal poles and streetlight arms to be used for the Network. If the City refuses to provide the necessary rights to City assets in any location, then EarthLink will not be responsible to include coverage for such affected location. EarthLink's obligations to provide the Network and the Coverage Level are dependent upon EarthLink's obtaining the Underlying Rights from the City and all applicable third parties. If EarthLink is unable to obtain the Underlying Rights from third parties, including without limitation any pole attachment rights from any utility or other third party, then EarthLink's performance obligations will be reduced to the extent the Coverage Level cannot be obtained for a given location and EarthLink will not be in default for any failure to provide the Coverage Level originally set forth in the Plans and Specifications

5. WORK SCHEDULE DELAYS – If Milpitas requests a delay in performance of the installation by EarthLink and its contractors then such delay shall not be unreasonable in length and all Milestones and deadlines shall be extended by the same number of days as the number of days in the delay.
6. AUTHORIZATIONS OBTAINED BY MILPITAS - Milpitas represents and warrants, to the best of its actual knowledge that all Poles identified in the coverage areas are owned by Milpitas, including the lights and signals attached thereto, and Milpitas has the full authority and right to grant to EarthLink and its successors the rights for Pole attachments set forth herein. Milpitas grants to EarthLink all other authorizations and rights and easements and other Underlying Rights to Milpitas owned poles appropriate for EarthLink to perform the installation and maintenance of the Network as described in this Agreement. EarthLink will not mount, install, operate, repair or maintain any radio or antenna on any property of Milpitas, except as expressly authorized by and in strict compliance with this Agreement. Prior to beginning the installation for the Network, Milpitas reserves the right to restrict the specific placement of EarthLink's equipment to address neighborhood, or other community aesthetic concerns including areas identified by Milpitas as "Restricted Areas."
7. ADDITIONAL SERVICES – If EarthLink intends to provide any service other than the Services specifically described on Exhibit B, then EarthLink shall

immediately notify Milpitas in writing of this intended additional service or change in service. EarthLink may expand and upgrade the Services in any way that improves or enhances the Services but if EarthLink intends to reduce services then Milpitas will either, 1) accept the proposed change in service on such terms and conditions as the parties find mutually agreeable in which case Exhibit B shall be revised appropriately and be substituted for the then current version of the Exhibit or 2) require that the Services not be reduced below the then-existing service level agreement to the extent not beyond the reasonable control of EarthLink, but rather continue to be provided as contemplated in the then current version of Exhibit F (Service Level Agreement).

8. **AVAILABILITY** – Milpitas receives electric utility service from Pacific Gas Electric Corporation (PG&E) to provide power to all of the City's traffic signals 24 hours a day, every day, and to provide power to the vast majority of the City's street lights 24 hours a day every day. To the best of Milpitas's knowledge, the relatively few street lights which are not set up to have power supplied 24 hours per day are not suitable for EarthLink's use under this Agreement. Milpitas cannot and will not guarantee an uninterrupted supply of power, nor can it guarantee the quality of power provided by PG&E. Notwithstanding anything to the contrary, EarthLink's performance under this Agreement's service levels and Coverage Levels are subject to PG&E providing adequate electricity 24 hours per day every day and EarthLink shall not be deemed to be in default of any service levels or Coverage Levels during such time and in such areas as are directly affected by the lack of power. Milpitas shall not be responsible for any payment or payments to PG&E or any other electricity provider of electrical usage by EarthLink. EarthLink shall be responsible for any and all agreements with electricity providers for the use of electrical power, including but not limited to power usage, metering and any other electric utility services. Prior to commencing service, EarthLink shall provide to Milpitas sufficient evidence of an agreement with PG&E or any other applicable electricity provider for electrical service.
9. **SPECIAL SITE ISSUES** — Due to the topography of certain areas of the City and infrastructure not necessarily suited to the attachment of the approved radio antenna enclosure, the parties agree that the initial design of the Network will address the following:
 - a. Areas of concern will be identified as part of the initial Plans and Specifications;
 - b. EarthLink will propose at its sole expense solutions for City consideration and approval as described in the Design Control Documents mutually agreed upon by the parties; and
 - c. The initial Plans and Specifications may or may not include coverage in any Restricted Area and such other locations described in the Design Control Documents as not included in the coverage area.

10. SERVICE LEVEL AGREEMENT — EarthLink and the City will form a steering committee to establish and manage service levels for the Network. The steering committee will be comprised of the City Manager (or his designee) and representatives of Milpitas appointed by the City Manager (or his designee) and an equal number of representatives named by EarthLink (collectively the “Steering Committee”). At least two of the City’s representatives and two of Earthlink’s representatives must be present at any meeting (by phone or in person) to constitute a quorum and allow for any business of the Steering Committee to be conducted. From time to time, the City and EarthLink may amend the Service Level Agreement in response to technology or market factors as the City and EarthLink mutually agree in writing, based upon recommendations by the Steering Committee. The Service Level Agreement will describe in detail the Coverage Levels for the Network and the scope and locations of the Coverage Levels. To avoid any over-saturation of radio antenna devices in any one particular area of the City, EarthLink will not install radio transmitter/receivers on more than 45 poles, traffic lights or street lights per square mile, provided that EarthLink will be entitled to install as many radios and equipment as is necessary to obtain the Coverage Level subject to the approval of the City. If more transmitter/receivers are required to be installed to obtain the Coverage Level, then the Steering Committee will review the matter and determine a solution mutually agreeable to EarthLink and the City.
11. MARKETING COOPERATION – EarthLink shall be responsible for marketing and administering the operations of the Network. Milpitas shall cooperate in marketing, advertising and promotional plans, schedules and materials regarding the Network in accordance with a mutually agreed upon marketing plan. EarthLink and Milpitas shall work jointly and in cooperation to make the public aware of services enabled by the Network to the extent possible under local ordinances, laws and regulations.
12. PERMITS, FEES AND DEPOSITS — EarthLink and Milpitas will cooperate and assist each other in performing the following and any delay arising from the other party shall permit the delayed party an extension equal to the period of delay:
 - a. Obtain all applicable permits as required for EarthLink to comply with applicable laws, regulations and ordinances.
 - b. Pay to Milpitas all applicable deposit fees, permit fees and other fees or amounts required, provided such fees and charges are not higher than the lowest of such fees and charges actually charged to any others.
 - c. Pay the fees and charges described on the attached Exhibit E.

- d. As provided in Section 8 of this agreement EarthLink shall be responsible for the payment of allelectricity consumption fees..
 - e. Milpitas shall have the option to use the Network of EarthLink during the Term of this Agreement in accordance with the terms specified in the attached Exhibit E. Notwithstanding the foregoing, in lieu of payment of pole attachment fees, Milpitas and EarthLink may agree to substitute goods and services as provided on the attached Exhibit E.
13. WORK STANDARDS — EarthLink agrees to perform the Services in accordance with all applicable ordinances, laws and regulations, including all traffic laws and regulations (including, without limitation, those set forth as California DOT standards) and in accordance with the attached Statement of Work, Plans and Specifications and Schedule of Performance. EarthLink shall comply with all applicable laws, ordinances and regulations. EarthLink shall use commercially reasonable efforts to notify affected residents, property owners and businesses prior to commencement of work that could affect the quiet enjoyment of their property. EarthLink acknowledges that Milpitas has made no warranties, guarantees or representations regarding the fitness, safety, or suitability of any of Milpitas's property for the installation of EarthLink's equipment or for this Network and that any performance of work or costs incurred by EarthLink or provision of Services contemplated under this Agreement by EarthLink is at EarthLink's sole risk. Further, EarthLink's work under this Agreement shall be fully in compliance with the requirements set forth in Exhibit G.
14. COLLOCATION OF EQUIPMENT — Milpitas and EarthLink agree that one of the inducements to EarthLink for deploying their Network in Milpitas is the collocation of equipment and potential use of Milpitas fiber to connect to an existing EarthLink Internet point of presence. Further, that the expansion of the broadband wireless network will provide opportunities to better serve Milpitas public safety and operations. Therefore, the parties agree to work cooperatively to maximize the benefits associated with collocation of equipment and network components already deployed by Milpitas. Where equipment is collocated, EarthLink shall follow approved procedures of notification and inspection when access is required.
15. REMOVAL OF EQUIPMENT—Unless Milpitas and EarthLink enter into an agreement that provides otherwise, upon the expiration, completion or earlier termination of the Term of this Agreement, EarthLink shall promptly, safely and carefully remove all radio antennas installed by EarthLink from all Milpitas property and return Milpitas property to the condition in which the property existed immediately prior to EarthLink's installation. EarthLink acknowledges and agrees that it bears all risk of loss or damage of its equipment and materials installed on Milpitas property or in Milpitas's public rights of way, except for damages arising from the negligence or wrongful acts

of Milpitas or its employees, agents or contractors. The removal shall be according to a mutually agreed upon schedule over a time period that shall not exceed six (6) months from the expiration, completion or earlier termination of the Term of this Agreement.

16. RELOCATION OF NETWORK – Milpitas may from time to time require EarthLink to remove or relocate a Network element, and EarthLink shall, at Milpitas's direction, remove or relocate the specified piece of equipment upon a request from Milpitas based on the specific configuration or re-configuration of the right of way or roads in the right of way, e.g. a removal or relocation caused by widening of the road, provided that where a removal or relocation is required the City will provide a suitable alternative for EarthLink to re-locate the equipment of EarthLink. Milpitas shall notify EarthLink immediately of any Underlying Rights known to Milpitas related to the Milpitas owned assets that may interfere with the Network or EarthLink's obligations in connection with this Agreement. Upon the expiration, non-recognition or other termination of an Underlying Right that is necessary in order to grant, continue or maintain an Underlying Right required for any portion of the Network or provision of the Services, Milpitas will notify EarthLink in writing, and Milpitas shall use commercially reasonable efforts to obtain a renewal of the Underlying Right.
17. PAYMENT OF TAXES — EarthLink will pay all taxes applicable. Milpitas will not enact any taxes that would apply only to the Network or EarthLink. EarthLink will pay any and all taxes which may be levied against Earthlink by any tax authority. This Agreement may create a property interest which may be subject to state and/or county property taxation if created, and the party in whom the possessory interest is vested may be subject to the payment of such property taxes levied on the interest.
18. INDEPENDENT CONTRACTOR — EarthLink, in the performance of the work and Services agreed to be performed pursuant to this Agreement, shall act as and be an independent contractor and not an agent or employee of Milpitas. EarthLink shall have the discretion to operate the Network as EarthLink determines provided that such operation shall at all times be in accordance with the requirements of this Agreement and any and all applicable Federal, State and local laws, statutes, rules, regulations and ordinances.
19. FORCE MAJEURE - Neither party shall be responsible for any of its obligations under this Agreement prevented or delayed by reasons which are not reasonably foreseeable and not reasonably avoidable, including Acts of God, floods, fires, hurricanes, tornadoes, earthquakes or other unavoidable casualty, acts of public enemy, insurrection, war, riot, sabotage, epidemic, strike or other labor disputes, freight embargoes, shortages or unavailability of materials or supplies due to governmental action, unusually severe weather conditions, concealed and unknown conditions below the surface of the ground

differing materially from those ordinarily encountered and generally recognized as inherent in construction work or which are not reflected on current maps or drawings of underground conditions, or wrongful physical obstruction by any Person at any installation site ("Force Majeure Event"). The time within which any obligation must be performed under the terms of this Agreement shall be extended for a reasonable period to be determined jointly by the City and EarthLink where timely performance is prevented due to a Force Majeure Event. EarthLink or the City shall promptly notify the other party of any Force Majeure event described in this Section and, in such notice, shall indicate the anticipated extent of such delay and shall indicate whether, and to what extent, if any, the delayed party anticipates that such event shall affect the timely performance of such party's obligations under this Agreement.

20. **ASSIGNABILITY** — Neither party shall have the right to assign or otherwise transfer this Agreement, in whole or in part, without the prior, written consent of the other party which consent shall not be unreasonably withheld, provided that after the Network is operating then EarthLink shall be entitled to transfer the Network and its operations to entities in the future as long as EarthLink continues to guaranty the compliance with this Agreement by such transferee or the transferee is sufficiently capitalized in order to perform the Services hereunder and further provided that EarthLink may freely assign this Agreement, in whole but not in part, in connection with a sale of all or substantially all of its assets, a merger or other corporate reorganization. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and permitted assigns. In addition, EarthLink shall have the right to subcontract Services to its business partners that perform services.
21. **INDEMNIFICATION** — As respects bodily injury, death, personal injury, or third-party property damage, EarthLink agrees to indemnify, defend with counsel approved by Milpitas, and hold harmless Milpitas, its officials, officers, employees, agents, and representatives from and against any and all claims, losses, damages, defense costs, or liability, of any kind or nature (collectively referred to hereinafter as "Claims"), arising out of or in connection with EarthLink's (or EarthLink's contractors' or subcontractors', if any) (i) acts, errors, omissions, or unsafe acts, or (ii) work performed by, or on behalf of, EarthLink, relative to this Agreement; except for those Claims which arise out of the sole gross negligence or willful misconduct of Milpitas. As respects any damage or loss which does not arise out of bodily injury, death, personal injury, or third-party property damage, EarthLink agrees to indemnify, defend with counsel approved by Milpitas, and hold harmless Milpitas, its officials, officers, employees, agents, and representatives from and against any and all claims, losses, damages, defense costs, or liability, of any kind or nature (collectively referred to hereinafter as "Claims"), arising out of or in connection with EarthLink's (or EarthLink's contractors' or subcontractors', if any) negligent or wrongful performance under this Agreement; except to the extent that such

Claims arise out of the gross negligence of willful misconduct of Milpitas. The obligations set forth in this Indemnification provision (i) shall be in effect without regard to whether or not Milpitas, EarthLink, or any other person maintains, or fails to maintain, insurance coverage, or a self-insurance program, for any such Claims; and (ii) shall survive the termination of this Agreement. Nothing herein shall prevent EarthLink's insurer(s) from satisfying EarthLink's obligations under this Section.

22. OWNERSHIP –EarthLink shall retain title to the Network and each device and components thereof. No portion of the Network shall become a fixture unless EarthLink expressly agrees otherwise in writing. Milpitas may access and use the Network as described in the Subscriber Access Agreement executed by Milpitas and EarthLink. Milpitas shall not gain any ownership rights in or to the Network, in whole or in part. In no event will Milpitas translate, modify, disassemble, or reverse engineer the Network or create derivative works based on any portion of the Network or the Design Control Documents or authorize or permit others to do so. The foregoing in no way limits, restricts or in any way applies to systems, operations or networks developed by City, its contractors or subcontractors for the benefit of City operations.

23. INSURANCE—

Without limiting Milpitas's right to indemnification, it is agreed that EarthLink shall secure, prior to commencing any activities under this Agreement, and maintain, during the term of this Agreement, insurance coverage as follows:

Workers' Compensation Insurance as required by California statutes and Employers Liability in an amount not less than \$500,000 per occurrence.

Commercial General Liability Insurance, including coverage for Premises and Operations, Contractual Liability, Personal Injury Liability, Products/Completed Operations Liability, and Independent Contractor's Liability (if applicable), in an amount not less than Ten Million Dollars (\$10,000,000) per occurrence, Twenty Million Dollars (\$20,000,000) annual aggregate, written on an occurrence form, provided this coverage may be maintained by EarthLink combining primary and excess policies to meet these requirements.

Comprehensive Automobile Liability Coverage including – as applicable – owned, non-owned and hired autos, in an amount not less than Ten Million Dollars (\$10,000,000) per occurrence, combined single limit, provided this coverage may be maintained by EarthLink combining primary and excess policies to meet these requirements.

Each insurance policy required by this Agreement shall contain the following clause or shall otherwise provide for the following conditions:

"This insurance company shall not cancel this policy until after thirty (30) days prior written notice has been given to the City Clerk, City of Milpitas, 455 East Calaveras Boulevard., Milpitas, CA 95035, except in the event of cancellation for non-payment of premium which shall provide for not less than ten (10) days notice."

Each insurance policy required by this Agreement, except policies for Workers' Compensation, shall contain the following clauses or shall otherwise provide for the following conditions:

"It is agreed that any insurance maintained by EarthLink pursuant to this Agreement shall be primary to, and not contribute with, any insurance or self-insurance maintained by the City of Milpitas."

"The City of Milpitas, its officers, agents, employees, and representatives are added as additional insureds as respects the acts, omissions, operations, and activities of, or on behalf of, the named insured, in regard to products supplied, or work or services performed for, or under an agreement with the City of Milpitas."

Prior to commencing any work under this Agreement, EarthLink shall deliver to Milpitas insurance certificates confirming the existence of the insurance required under this Agreement, including certificates naming the City as additional insured as well as any applicable clauses and/or provisions referenced above. Also, within thirty (30) days of the execution date of this Agreement, EarthLink shall provide Milpitas (i) endorsements to the insurance policies which add to these policies the applicable clauses referenced above, or (ii) in lieu of said endorsements, documentation acceptable to Milpitas evidencing that the coverage, terms, and conditions set forth in the above-referenced clauses are otherwise provided for in said insurance policies. Said endorsements shall be signed by an authorized representative of the insurance company and shall include the signatory company's affiliation and title. Should it be deemed necessary by Milpitas, it shall be EarthLink's responsibility to see that Milpitas receives documentation acceptable to Milpitas which sustains that the individual signing said endorsements is indeed authorized to do so by the insurance company. Insurance required hereunder shall be placed with insurers (i) admitted to write insurance in California and (ii) possessing an *A. M. Best's* rating of A-VII or higher, provided that should an insurer be downgraded below A-VII during any given policy term EarthLink will not be required to change, or (iii) otherwise acceptable to Milpitas, with prior written permission from Milpitas. Also, in the event that (i) a claim is filed against Milpitas, or its officers, employees, agents, or representatives, for which Milpitas believes, in good faith, there may be coverage under an insurance policy required by this Agreement, and (ii) Milpitas has tendered such claim to the insurer that issued such policy, and (iii) such insurer has not agreed, within ninety (90) days, to cover such claim, including defense and indemnity, without reservation, then

City has the right to demand of EarthLink, and to receive within thirty (30) days, a copy of such insurance policy.

In addition to other remedies Milpitas may have if EarthLink fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, Milpitas may, at its sole option:

Order EarthLink to stop work under this Agreement and/or withhold any payment(s) which become due to EarthLink hereunder until EarthLink demonstrates compliance with the requirements hereof;

Exercise of any of the above remedies, however, is an alternative to other remedies Milpitas may have and is not the exclusive remedy for EarthLink's failure to maintain insurance or secure appropriate endorsements.

24. **TERMINATION** — This Agreement may be terminated by either party upon ninety (90) days prior written notice to the other party of the existence of a Major Default by such other party, if such Major Default is not cured within such ninety (90) day cure period. "Major Default" means that the defaulting party has failed to comply with a material provision of this Agreement or the attached Service Level Agreement that has not been cured within the applicable cure period described above, provided that such ninety (90) day cure period shall be extended for so long as EarthLink is diligently pursuing a correction for such Major Default and Milpitas shall, after the end of such cure period engage in the Dispute Resolution Process described below in Section 40 before terminating this Agreement and in all events this Agreement shall not be deemed terminated for a Major Default unless a court of competent jurisdiction has issued a final order that the defaults of defaulting party do in fact constitute a Major Default that was not cured within the applicable cure period, as extended above. If the Dispute Resolution Process results in agreement between the parties that there is a plan to cure the Major Default that will be in the best interests of all parties then prior to terminating this Agreement both parties shall exercise reasonable efforts to implement such plan in accordance with such terms as the parties have agreed upon. Milpitas acknowledges that the requirements of this section are to protect the substantial investment of EarthLink represented by installing the Network at the cost of EarthLink, which would be substantially lost if this Agreement was terminated. Neither the City nor EarthLink should be considered in Major Default of this Agreement for any failure if the failure is caused in whole or in part by the failure of another party or by an act or omission of a third party, provided the defaulting party continues to diligently pursue correcting the Major Default.

25. **GOVERNING LAW** — This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of California, without regard to the conflict of law provisions thereof. Any action brought relating to the interpretation or enforcement of this Agreement may be brought in any court

located in Santa Clara County, California, or the Federal Court for the Northern District of California.

26. COMPLIANCE WITH LAWS – EarthLink will comply with all applicable laws, ordinances and regulations as set forth anywhere in this Agreement. Milpitas agrees to facilitate the process of approvals by departments of Milpitas so that additional costs or delays do not occur as set forth in the service level agreement on Exhibit F.
27. APPROVAL - If the approval or consent of any party is required under this Agreement, such approval or consent may only be given in writing, and shall not be unreasonably withheld or delayed.
28. WAIVER - The failure of a Party at any time or times to require performance of any provision hereof shall in no manner affect its right at a later time to enforce the same. No waiver by a Party of any condition or of any breach of any term, covenant, representation or warranty contained in this Agreement shall be effective unless in writing, and no waiver in any one or more instances shall be deemed to be a further or continuing waiver of any such condition or breach in other instances or a waiver of any other condition or breach of any other term, covenant, representation or warranty. The headings preceding the text of articles and sections included in this Agreement and the headings to schedules attached to this Agreement are for convenience only and shall not be deemed part of this Agreement or be given any effect in interpreting this Agreement. Unless otherwise indicated, words describing the singular number shall include the plural and vice versa, and words denoting each gender shall include the other gender and words denoting natural persons shall include corporations and partnerships and vice versa. The use of the terms “including” or “includes” shall in all cases herein mean “including, without limitation” or “include, without limitation,” respectively. Unless otherwise indicated, references to articles, sections, subsections or schedules shall refer to those portions of this Agreement. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting or causing any instrument to be drafted.
29. BOOKS AND RECORDS—EarthLink shall maintain any and all records as agreed to by the parties in signed paper writing and as required by law.
30. CONFLICT OF INTEREST — Milpitas and EarthLink shall avoid all conflicts of interest or appearance of conflicts of interest in the performance of this Agreement.
31. RESERVATION OF RIGHTS — This Agreement grants EarthLink the right to use the Poles owned by Milpitas in the manner provided herein, including all Milpitas owned streetlights and traffic signals, for Wireless Broadband Internet services during the Term to mount approved devices as set forth in Exhibit D

for use in connection with creating and maintaining a broadband wireless internet network and to be recognized as Milpitas's "Wireless Connection." Except as provided herein, Milpitas and EarthLink agree that nothing contained in or contemplated by this Agreement is intended to confer, convey, create or grant to EarthLink any perpetual real property interest in any Milpitas property or in any of Milpitas's public rights of way or easements.

32. CITY PROJECT MANAGEMENT COST RECOVERY — EarthLink shall reimburse Milpitas at the then prevailing hourly rate for services of City staff/City Project Coordinator, including all legal fees and costs to review, draft or consult with staff or the Parties on this Agreement, to expedite the Project to the extent such services are requested by EarthLink. Upon request of EarthLink Milpitas agrees to make its staff and employees reasonably available for guidance in completing and maintaining the Project and no fees or charges will be due unless specifically agreed to in writing signed by both parties. The fees payable to the City will be designated and agreed upon mutually in the Design Phase of the Project.

33. LIMITATION OF LIABILITY

THE PARTIES EXPRESSLY AGREE THAT EARTHLINK SHALL NOT BE LIABLE TO MILPITAS FOR INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES, REGARDLESS OF WHETHER ADVISED OF, OR OTHERWISE SHOULD HAVE BEEN AWARE OF, THE POSSIBILITY OF SUCH DAMAGES, REGARDLESS OF THE LEGAL THEORY OR BASIS FOR SUCH CLAIM. EarthLink shall not be liable to Milpitas for direct damages in an amount in excess of the amounts received by EarthLink for the Network during the immediately preceding twelve (12) months, except that this sentence shall not apply to, or diminish EarthLink's responsibility for, any bodily injury, death, personal injury, or damage to the property of a person not a party to this Agreement, including, without limitation, the injury to, death of, or personal injury to any person or persons working for, or on behalf of, EarthLink or EarthLink's contractors or subcontractors, if any.

34. NO WARRANTIES – THE ONLY WARRANTIES CONCERNING THE SERVICES, SYSTEM AND OTHER DELIVERABLES PROVIDED UNDER THIS AGREEMENT ARE THOSE CONTAINED HEREIN, AND ARE MADE FOR THE BENEFIT OF MILPITAS ONLY IN LIEU OF ALL OTHER WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE. EARTHLINK ALSO SPECIFICALLY DISCLAIMS ANY WARRANTIES OR REPRESENTATIONS RELATED TO THE INTERNET; SECURITY-RELATED FEATURES OF THE SYSTEM AND/OR SERVICES CANNOT GUARANTEE COMPLETE SECURITY VIA THE INTERNET OR

WIRELESS SERVICES AND EARTHLINK SHALL NOT BE LIABLE FOR BREACHES OF SUCH SECURITY OR ANY OTHER RELATED WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, INTERNET FUNCTION AND/OR PERFORMANCE WARRANTIES. EARTHLINK SHALL HAVE NO LIABILITY FOR THE CONDUCT OF SUBSCRIBERS USING OR ACCESSING THE SYSTEM OR SERVICES.

35. CONFIDENTIALITY - Except as permitted by this Agreement, neither party will use the Confidential Information of the other. Each party will use reasonable efforts, to the extent it does for its own proprietary and confidential information of like nature, to prevent any Confidential Information of the other party from being disclosed to third parties except as set forth in this Agreement or as authorized by a party in writing. "Confidential Information" will mean a party's trades secrets under applicable law and also the proprietary and confidential information disclosed to the other party. Milpitas acknowledges that all information concerning EarthLink, its business plans, proprietary rights, Subscribers, customers and suppliers will be deemed Confidential Information of EarthLink, whether or not marked "CONFIDENTIAL", and will not be used or disclosed by Milpitas except in the proper performance of its obligations imposed by law or under this Agreement. EarthLink acknowledges that the City of Milpitas is bound by the California Public Records Act which provides for the mandatory disclosure of certain records to the public upon request. Any disclosure by the City pursuant to the California Public Records Act shall be exempt from the provisions of this paragraph. This paragraph will not apply to any information which: (A) is or becomes public knowledge through no wrongful act of the receiving party; (B) is already known to the receiving party without obligation of confidentiality; (C) is rightfully obtained by the receiving party from any third party without similar restriction and without breach of any obligation owed to the disclosing party; (D) is independently developed by the receiving party; (E) is furnished to a third party by the disclosing party without a similar restriction on the third party's rights; (F) is disclosed pursuant to a lawful requirement or request of a governmental agency; (G) is approved for release by written authorization of the disclosing party; or (H) is disclosed in an enforcement or defense in a court of law pursuant to this Agreement or as is appropriate to assert and protect the rights of either party. Despite the restrictions of this paragraph, EarthLink will be entitled to provide Milpitas's Confidential Information to third party contractors of EarthLink who have executed a written confidentiality agreement. The provisions of this Section shall survive for any trade secret for so long as such information qualifies as a trade secret under applicable law and for three (3) years following the termination of this agreement for Confidential Information that does not rise to the level of a trade secret. Upon any termination or expiration of this Agreement or as otherwise requested in writing by the disclosing party, to the extent permitted by the law, the receiving party will return or destroy (as requested by the disclosing party) all copies of

the Confidential Information provided by the other Party and certify in writing that all copies of such Confidential Information have been returned or destroyed.

36. NOTICES - Any notice, request, instruction or other document to be given hereunder by a party pursuant to this Agreement shall be in writing and shall be deemed to have been given: (a) when received if given in person or by courier or a courier service; (b) on the date of transmission if sent by telex, facsimile or other wire transmission; or (c) three (3) business days after being deposited in the U.S. mail, certified or registered mail, postage prepaid.

If to Milpitas:

City Clerk
455 E. Calaveras Blvd
Milpitas, CA 95035

with a copy to:

City Manager
455 E. Calaveras Blvd
Milpitas, CA 95035

If to EarthLink:

EarthLink, Inc.
1375 Peachtree Street
Atlanta, Georgia 30309
Attention: General Counsel

With a copy to:

EarthLink, Inc.
EarthLink Municipal Networks
General Market Manager - City of Milpitas
460 Sierra Madre Villa Ave
Mail Stop: 2A1-16
Pasadena, CA 91107

or to such other individual or address as a Party may designate for itself by notice given as herein provided.

37. PRIOR AGREEMENTS AND AMENDMENTS — This Agreement constitutes the entire agreement between the Parties. Except as set forth herein, there are no promises, representations or understandings between the parties of any kind or nature whatsoever. Electronic communications and documents will not be sufficient to modify this Agreement however a facsimile transmission of signed paper writing is sufficient and shall be deemed to be a signed writing on paper.

38. EFFECTIVE DATE AND AUTHORITY – This Agreement shall become effective as of the Effective Date of this Agreement upon the authorized execution on behalf of both parties provided, however, the Franchise shall become effective only upon the acceptance thereof by EarthLink.

39. ADDITIONAL PROVISIONS –

- A. EarthLink shall not be obligated to commence or perform the installation or operation of the Network as required herein unless a Proof of Concept Pilot is conducted and both EarthLink and Milpitas have mutually accepted the results of the Proof of Concept Pilot (hereinafter referred to as “Accepted”). If Milpitas and EarthLink agree that the Proof of Concept Pilot is Accepted and substantially complete and in compliance with the requirements of this Agreement and in compliance with EarthLink’s design parameters (“Acceptance” and “Accepted”) then EarthLink shall proceed with the entire installation and operation as provided in this Agreement. However if either Milpitas or EarthLink determines that the Proof of Concept Pilot is not Accepted, then this Agreement will terminate and EarthLink shall not have any further obligations or liabilities and the Proof of Concept Pilot shall be disassembled and removed by EarthLink, or in the alternative, if Milpitas and EarthLink mutually agree, the ownership of the Proof of Concept Pilot shall be transferred to Milpitas or its designee and Milpitas shall not owe EarthLink anything for the work or the transfer of the Proof of Concept Pilot Network.
- B. EarthLink will retain ownership of all intellectual property rights and ownership of all documents, data, studies, surveys, maps, models, photographs, reports or other materials prepared by EarthLink or its subcontractors resulting from this Agreement. Milpitas shall not use, extend or enlarge any intellectual property produced under this Agreement unless in each case EarthLink consents in writing which such consent, as to use of maps, photographs, logos, trademarks and marketing materials, may not be unreasonably withheld by EarthLink.
- C. Milpitas represents and warrants the following are, to the best of Milpitas’s knowledge, and will continue to be, true, complete, correct and accurate and Milpitas agrees that the obligations of EarthLink hereunder are conditioned upon all of the following (“Conditions”) being, and continuing to be, true, complete, correct and accurate:
 - i. This Agreement and other agreements, easements, permits and leases as contemplated in the Proposal and this Agreement must be agreed upon by both the City and EarthLink and fully authorized and signed on paper by both parties and any other required parties within 180 days after the date of this Agreement.
 - ii. As of the Effective date of this Agreement, Milpitas is not aware of any court actions, City Council ordinances or pending actions, civil actions, challenges,

laws, regulations or claims asserted or threatened, that if successful, would result in EarthLink not having all of the rights to perform as described in this Proposal and this Agreement.

If by the day that is 180 days after the Effective Date of this Agreement the above Conditions are not satisfied in the reasonable judgment of EarthLink, then EarthLink shall be entitled to either terminate all of its obligations hereunder or continue to work with Milpitas to complete the conditions above, provided that at any time thereafter as long as the conditions are not satisfied then EarthLink can later elect to terminate.

D. Future Expansion.

EarthLink will include upgrades and new technology to the Network it operates under this Agreement if EarthLink so elects to retain market competitiveness.

Because of the significant investment by EarthLink in the present wireless Network, EarthLink desires the opportunity to provide additional wireless broadband services to Milpitas. Therefore, if during the Term of this Agreement, Milpitas desires from time to time to consider additional wireless internet protocol (IP) applications to serve municipal operations only ("New Network") then before Milpitas enters with any provider into any bids or contract(s) related to such New Network, Milpitas shall: (1) give EarthLink notice of such desire to implement a New Network and provide all relevant details and answer all reasonable questions of EarthLink; and (2) give EarthLink the opportunity to propose solutions and terms that build on EarthLink's Network; and (3) evaluate the modification/inclusion within this franchise of the EarthLink solution(s) as the preferred approach to meeting the City's service delivery objective. The City is under no obligation to use an EarthLink proposed solution and retains the sole right to evaluate their offering with other solutions. Milpitas may add additional wireless nodes to its existing and future networks, as deemed necessary, in order to provide the coverage that the City requires for municipal applications; without the approval of EarthLink.

40. DISPUTE RESOLUTION PROCESS—

Any dispute between the Parties which arises during the Term of this Agreement and which the Parties cannot then resolve shall be subject to the following administrative remedy prior to termination of this Agreement or any litigation occurring between the Parties:

A. The Parties shall attempt to resolve any controversy, claim, problem or dispute arising out of, or related to, this Agreement (a "Dispute") through good faith consultation in the ordinary course of business. In the event that the Dispute is not resolved by the project managers of the Parties, either Party may upon written notice to the other Party request that the matter be referred to the senior management official within each respective organization with express authority to

resolve the Dispute ("Request for Internal Resolution"). A written Request for Internal Resolution shall be given by either Party within thirty (30) calendar days of the Parties' knowledge that the project managers were unable to resolve the Dispute. Senior management officials shall meet or confer at least once in good faith, to negotiate a mutually acceptable resolution within ten (10) business days of the Request for Internal Resolution. For the purposes of this paragraph, the designated project manager for Milpitas shall be designated by the City Manager and for EarthLink shall be Audra Hoynacki, Market Manager. The senior management official for Milpitas shall be designated by the City Manager; and for EarthLink shall be Cole Reinwand, VP Municipal Networks, Product Strategy and Marketing. The project managers and/or senior management officials may be changed by notice given by the Party changing its personnel.

B. Notice. Project managers and senior management officials are each required to meet only once but either group may mutually agree to meet more than once if it appears that further meetings may successfully resolve the Dispute. If the Dispute is not resolved to the mutual satisfaction of the Parties by the project managers or senior management officials, then either Party may provide written notice to the other Party requesting mediation of the Dispute ("Request for Mediation"). A Request for Mediation shall not be given prior to the required meeting of the senior management officials regarding the Dispute, or at least fifteen (15) business days after the request for Internal Resolution, whichever is earlier, and shall not be given any later than ninety (90) calendar days following the date of the first senior management officials meeting. The Request for Mediation shall set forth all of the issues that Party deems outstanding that must be submitted to mediation. The Party in receipt of the Request for Mediation shall respond within twenty (20) business days listing any issues it deems appropriate for submission to the Mediator.

C. Mediation. Any Disputes, except those for which the remedy requested is injunctive relief, shall be mediated in non-binding mediation within sixty (60) calendar days of the date on the written Request for Mediation, or the soonest date thereafter that the mediator is available.

D. Mediator. The Mediator shall not be employees or contractors for either Party or in any way have an economic interest in the success or failure of the business of either Party. If the Parties are unable to agree upon a Mediator within ten (10) business days following the date of the Request for Mediation, that matter shall be submitted to the Judicial Arbitration and Mediation Service (JAMS) which shall provide the Parties with the names of three potential Mediators. Within two (2) business days following receipt of such names, EarthLink shall strike one of the names and notify Milpitas of the name stricken. Within two (2) business days thereafter, Milpitas shall strike one of the remaining names and notify EarthLink of the name stricken. The remaining name shall be the person who shall serve as the Mediator and JAMS shall immediately be so notified and a mediation date determined.

E. Costs. The costs of mediation shall be borne by the Parties equally.

F. Condition Precedent to Filing Suit. Mediation under this section is a condition precedent to a Party filing any judicial proceedings unless either: (i) that Party has made demand for mediation and the other Party has failed or refused to engage in mediation, or (ii) such judicial proceedings are necessary to avoid the expiration of a limitations period that would otherwise bar such judicial proceedings after the end of any dispute resolution process provided herein.

G. Attorney Fees. In the event of litigation arising out of any dispute related to this Agreement, the Parties shall each pay their respective attorneys fees, expert witness costs and cost of suit, regardless of the outcome of the litigation.

41. ACCEPTANCE OF FRANCHISE –

Execution of this Agreement by EarthLink shall constitute the acceptance of the Franchise as required by Section 1403 of the Milpitas City Charter. This Agreement shall be subject to all applicable provisions of Sections 1400 – 1406 of the Milpitas City Charter.

IN WITNESS WHEREOF, the Parties acknowledge and accept the terms, conditions and obligations of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the Effective Date.

THE CITY OF MILPITAS

CITY OF MILPITAS

Charles Lawson, City Manager

ATTEST:

Mary Lavelle, City Clerk

APPROVED AS TO FORM:

Steven T. Mattas, City Attorney

APPROVED AS TO CONTENT:

Department/Division Head

EARTHLINK, INC.

By: _____
Name: _____
Title: _____

EXHIBITS

Exhibit A: Definitions

Defined terms not otherwise defined in this Agreement will have the meanings set forth below.

- a. "Council" or "City Council" means the City Council of Milpitas.
- b. "Deliverable(s)" means the work and result of the implementation, installation or consulting services that are provided to Milpitas under this Agreement resulting in a component of the Network or the Services.
- c. "Design Control Documents" means the documents that describe the design of the Network and location of devices in the City that is mutually agreed upon by Milpitas and EarthLink hereafter.
- d. "Party" means either of Milpitas or EarthLink.
- e. "Parties" means both Milpitas and EarthLink.
- f. "Person" means any individual natural person, firm, partnership, joint venture, entity, society, organization, club, association, trustee, trust, corporation, company or organization of any kind.
- g. "Proof of Concept Pilot" means the test implementation of a portion of the Network installed and implemented prior to the installation of all devices for the entire Network and used to test the viability and commercial feasibility of the Network as further described in this Agreement and the Design Control Documents. The scope, location and test criteria of the Proof of Concept will be mutually agreed upon by the Parties and described in the Design Control Documents.
- h. "Restricted Area" means the sites or properties as determined by Milpitas where no wireless network devices or service shall be installed or in service.
- i. "Services" includes the products and services described in any Statement of Work, including without limitation the Wireless Services made available to Subscribers, and the consulting, design, installation, implementation and maintenance services.
- j. "Schedule of Performance" means any event described in the Schedule of Performance Exhibit.
- k. "Subscribers" means any Person, including without limitation the City that subscribes and pays for the Wireless Services provided pursuant to the Network.

- l. "Subscriber Access Agreement" means the agreement EarthLink requires Subscribers to accept or agree to in order to access and utilize the Services via the Network, a form of which is attached as Exhibit B.
- m. "Network" is defined on the first page of the Agreement, including the equipment installed by or on behalf of EarthLink in the City used to provide the Wireless Services described in this Agreement.
- n. "Underlying Rights" means all deeds, leases, easements, rights-of-way agreements, licenses, franchises, permits, grants and other rights, titles and interests that are necessary for the construction, installation, maintenance, operation, use or repair of the Network.
- o. "Users" means the individual computers authorized by a Subscriber to access or use the Wireless Services.
- p. "Wireless Services" means the services that enable a computer to communicate through a wireless network using the Network without cable or wire lines connecting the computer to the Network.

Exhibit B—Network Description

The Network shall consist of Wi-Fi nodes, a point-to-multipoint fixed wireless backhaul network, and use of dark fiber leased from the City of Milpitas and microwave point-to-point high capacity backhaul links and the EarthLink layer 3 backbone POP and Internet backbone connectivity.

The Wi-Fi layer shall initially be in a mesh configuration and shall include up to 45 mesh Wi-Fi router nodes and backhaul radios per square mile which shall be compatible with standard 802.11 b/g networking devices. Nothing herein shall prevent EarthLink from upgrading the network to include emerging industry standards and specifications to meet market demands.

EarthLink shall specify use of 200 mW 802.11 b/g Wi-Fi equipment with 12 dBi high gain directional antenna in order to achieve indoor coverage.

The point to multipoint backhaul connectivity shall include devices that operate in 5.7 GHz, 5.2 GHz, and 900 MHz unlicensed spectrum. EarthLink may utilize devices that operate in other unlicensed or licensed spectrum bands in order to meet the SLAs in Exhibit F and market demands.

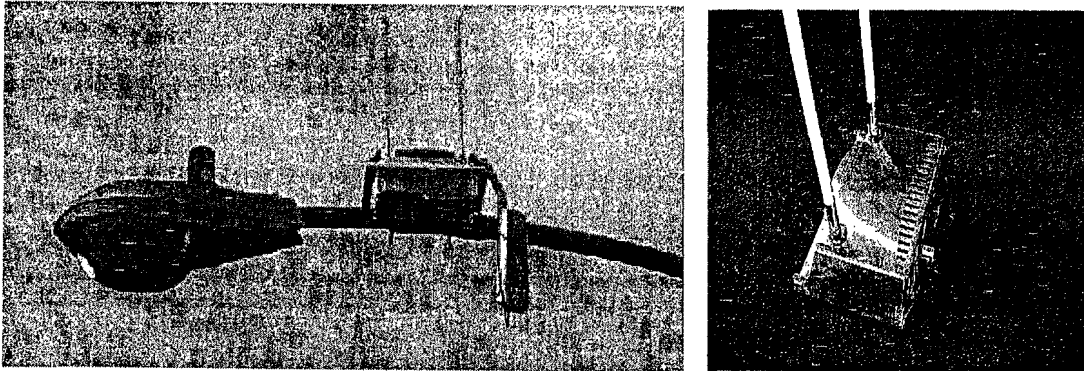
EarthLink may upgrade the network from time to time at its sole expense in order to take advantage of technology improvements and as the consumer marketplace dictates.

Exhibit C—Schedule of Performance

1. Product Roll Out Schedule. All timelines shall be contingent on EarthLink and the City of Milpitas fulfilling their obligations stated in the Franchise Agreement.
2. Statement of Work. Prior to the build out of the Milpitas Wireless Broadband Network, EarthLink shall provide for approval to the City of Milpitas, a detailed statement of work that will include specific time frames that will include the Phase 1 Proof of Concept and Phase 2 Full Market Roll Out. It is anticipated that the detailed statement of work will include the following schedule:
 - a. Milestone One – Proof of Concept Phase Completed – Minimum amount of time of completion will be in Month 3 and the maximum in Month 6 following execution of the Franchise Agreement – Beta versions of the EarthLink Retail Wi-Fi Broadband Product, the Government Wi-Fi Broadband Product and the Occasional Use Wi-Fi Broadband Product shall be tested and validated during this period. The Proof of concept shall take place in two distinct areas within the Coverage Area. Each of these Proof of Concept areas shall be a total size not to exceed 1 square mile each.
 - b. Milestone Two – Network Construction Completed – 6 months following completion of the Proof of Concept Phase – Production versions of the EarthLink Retail Wi-Fi Broadband Product, the Government Wi-Fi Broadband Product and the Occasional Use Wi-Fi Broadband Product shall be made available to the marketplace throughout the Coverage Area, as defined in the Service Level Agreements **[BILL: Is this (SLA) a defined term?]**.

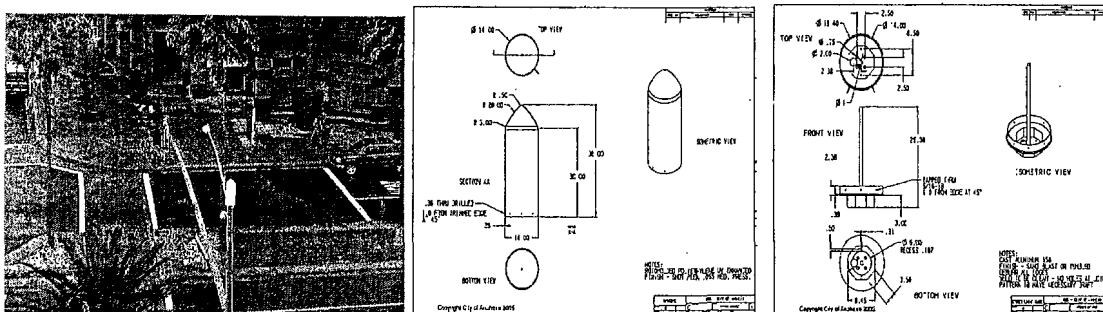
Exhibit D—Approved Device Configuration for Attachment to City Assets

Attachment to marblelite street light pole arms or traffic signal street light arms (external to Restricted Area or “designer poles”) with a single power cable connection (not exceeding 18 inches in length secured to the mast arm) and canopy (approximately twelve inches in length) without restriction (roughly 18x13x6 or smaller with two antenna not exceeding 17 inches in length):



Note: Above graphic shows canopy, only one third of fixtures will have additional equipment

Attachment to any poles except in Restricted Area or “designer poles”:



Note: Final installations have enclosure painted to match the traffic signal or street light pole.

Attachments to “Designer Poles” and in Restricted Area: In those areas of the City that have unique street light or traffic signal poles or is delineated as a Restricted Area the Parties will meet and determine solutions appropriate to each circumstance which may include a hybrid of the above options; the painting of housings to match existing poles; creation of new enclosures; and/or location in less visible areas.

Exhibit E—Fees and Charges

Payments by EarthLink to the City of Milpitas:

Pole Attachment Fees

In lieu of pole attachment fees, EarthLink shall provide the City of Milpitas access to the network for Public Safety and General Government use. Milpitas and EarthLink understand and agree to reach a mutually agreeable technical solution that will provide Milpitas Public Safety users a priority service on the Network. General Government usage will be provided at the same priority as consumer access. Additionally, EarthLink will provide indoor wireless service at no cost in the following City Facilities:

Milpitas Sports Center
Milpitas Community Center
Milpitas Senior Center

This access will be limited to a single access point per location and service may be limited to an agreed upon time period per user. The City will provide “backhaul” from these locations to an agreed upon location on the City network. EarthLink may display information and promotional materials at each of these locations in a form and manner acceptable to the City.

Electricity Fees

EarthLink shall pay directly to Pacific Gas & Electric Company all fees for electrical usage.

Facility Access and Fiber Connectivity Fees

The City of Milpitas shall provide access to City facilities for antenna mounting and dark fiber capacity to EarthLink for use in the Milpitas Wireless Broadband Network. The rate for facility or fiber use shall be set according to an agreed upon schedule.

Exhibit F—Service Level Agreements

The Parties shall work together in good faith to develop and agree upon additional service level agreements as are reasonable and advisable. Such SLAs shall be finalized following the Proof of Concept Phase and shall be agreed upon and appended to the Definitive Agreement by EarthLink and the City of Milpitas.

Targeted SLAs for Milpitas Wireless Broadband Network Operation			
CATEGORY	DEFINITION	SERVICE LEVEL	MEASUREMENT
Network Coverage		95% of the Coverage Area 90% indoor coverage, 95% outdoor coverage	As measured on 1 st and 2 nd floors of building in a room on outer edge of building facing the Access Point utilizing a 12 dBi high gain antenna and 200 mW CPE radio
Network Reliability – Mesh Layer	The reliability of the connection from the Network Interface Devices, such as mesh Wi-Fi router nodes to EarthLink certified customer premises equipment (CPE)	99.9% uptime	
Network Reliability - Backhaul	The reliability of the connection from the Network Interface Devices, such as mesh Wi-Fi router nodes or Point to Multipoint Tower Access Point equipment, to the EarthLink System Facilities.	99.99% uptime	Measure daily and report monthly. Tool: Remedy / Network Management System.
Network Outages		Not to exceed 4 continuous hours or 8 total hours per month	To be defined
Wi-Fi Broadband Products Performance Criteria		Over 95% of outdoor locations and 90% or indoor locations within coverage area capable of achieving Minimum 1 Mbps upstream / 1 Mbps downstream connection.	
IP Address Pool	Availability of IP Addresses within designated IP Address pools	<=70% utilization per pool or such lower utilization rate resulting from ARIN's allocation of IP addresses.	TBD – will determine methodology
Maintenance	Mean Time to Repair	Critical <= 2 hours Major <= 6 hours Minor <= 24 hours	Measure daily and report monthly. Tool: Remedy.

		<p>Critical: The condition impacts approximately [TBD] or more Service Subscribers.</p> <p>Major: The condition impacts approximately [TBD] or more (up to Critical Level) Service Subscribers.</p> <p>Minor: The condition impacts less than [TBD] Service Subscribers.</p>	<p>[TBD] days advance notification for scheduled maintenance activity.</p> <p>To be defined</p>
Customer Care	Average Speed to Answer (ASA) Calls from Subscribers to Service Tier 1 Agents	80% of all inbound calls to Service Provider Tier 1 will be answered within 180 seconds	Measure daily and report monthly. Tools: ACD Switch Reporting.

Exhibit G – Additional Work and Safety Requirements

This Exhibit G contains minimum requirements and specifications governing use and occupancy of Milpitas's utility poles, traffic light poles and arms, traffic lights, street light poles and arms, and any other such equipment owned by Milpitas or the utilities.

EarthLink's facilities shall be placed and maintained in accordance with the requirements and specifications of the rules and regulations of the California Public Utilities Commission, including General Order No. 95 (G.O. 95), the National Electrical Code (NEC), the National Electrical Safety Code (N.E.S.C.), the rules and regulations of the Occupational Safety and Health Act (OSHA), all of which are incorporated by reference into this Exhibit G, and of any governing authority having jurisdiction over the subject matter. Where difference in specifications may exist, the more stringent shall apply.

All requirements of the National Electrical Safety Code referred to in this Agreement shall mean the current edition of such code and shall include any additional requirements of any applicable Federal, State, County or Municipal Code or regulatory body, including the California Public Utilities Commission, with jurisdiction over Milpitas. Reference to either the Safety Code, or to N.E.S.C., have the same meaning.

EarthLink's wiring, cable, equipment and facilities shall be compatible with Milpitas's facilities so as not to damage any facilities of Milpitas.

Upon completion of work, EarthLink shall remove all of its tools, unused materials, wire clippings, cable sheathing and any other similar matter.

All of EarthLink's wiring, cables, equipment and facilities shall be firmly secured and supported to the satisfaction of Milpitas's authorized representative.

All of EarthLink's cables, equipment and facilities shall be plainly identified with a firmly affixed tag of a type and wording satisfactory to Milpitas.

EarthLink shall require that all its work crews or any of its contractors and subcontractors:

(i) are familiar with all power line rules, requirements, regulations, standards and guidelines under G.O. 95 and N.E.S.C.; (ii) survey the area in which work is to be performed before commencing such work and make a determination that the required work can be completed safely; (iii) survey the area in which work is to be performed before commencing work and make a determination that any electrical power lines are in conformance with G.O. 95 and N.E.S.C.; and (iv) proceed with such work only upon making such determinations. If the work crew determines that such work cannot proceed safely, or if such electrical power lines are not in compliance with either G.O. 95 or N.E.S.C., EarthLink shall immediately notify Milpitas of such condition, in detail, and shall not commence work at such location until so directed by Milpitas. It is understood and agreed by EarthLink that there is no instance in which it is safe or proper for a

EarthLink worker (whether working for or on behalf of EarthLink), or a worker's equipment, to come into contact with the electrical current from an energized electrical power line. Consequently, any such contact by EarthLink (or EarthLink's employees, agents, representatives, contractors or subcontractors, or the employees, agents, or representatives of such contractors or subcontractors) shall be deemed an unsafe act, or failure to act, under the meaning of this Agreement.

EMERGENCY CONDITIONS

EarthLink shall immediately notify Milpitas Emergency Dispatch Center at (408) 586-2420 of any emergency situation related to Milpitas's utility poles, traffic lights, or street lights, or EarthLink's facilities.